ECORD
AND
BRIEF

No. 16-1161

In The
Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF OF FAIRVOTE AND ONE NATION ONE VOTE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

FairVote is a 501(c)(3) nonpartisan organization that advocates for electoral reforms that give voters a stronger voice in the democratic process. One Nation One Vote is a non-profit organization with a mission to improve American democracy. FairVote and One Nation One Vote agree that partisan gerrymandering is a constitutional problem that courts must remedy.

FairVote and One Nation One Vote have expertise in the impacts of various voting and election methods. They submit this brief to emphasize the range of options available to prevent the excessive injection of politics into the redistricting process. Amici wish to explain that if the Court holds that excessive partisan gerrymandering is unconstitutional, lawmakers and the judiciary will have a large remedial toolbox available to them.

SUMMARY OF ARGUMENT

The foundation of American democracy rests on "the consent of the governed." Declaration of Independence (U.S. 1776). When lawmakers engage

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[1] All parties have consented in writing to the filing of this brief through letters on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

in partisan gerrymandering, they corrode this consent by punishing groups on the basis of their political beliefs in an effort to deprive them of equal representation. Without judicial intervention, partisan gerrymandering threatens to undermine the premise of our representative democracy, the promise of the Declaration of Independence, and the power of the Constitution.

Voting is the critical way in which we express our political associations and beliefs. As Judge Niemeyer recently explained, "when district mapdrawers target voters based on their prior, constitutionally protected expression in voting and dilute their votes, the conduct violates the First Amendment, effectively punishing voters for the content of their voting practices. This First Amendment test focuses *on the motive* for manipulating district lines, *and the effect* the manipulation has on voters, *not on the result* of the vote." *Benisek v. Lamone*, Civ. No. JKB-13-3233, slip op. at 28 (D. Md. Aug. 24, 2017) (Niemeyer, J., dissenting). *Accord Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in judgment) ("In the context of partisan gerrymandering, . . . First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.").

This Court has recognized that the Constitution bars the "excessive injection of politics" into the districting process. *Vieth*, 541 U.S. at 293 (plurality); *id.* at 312 (Kennedy, J., concurring in judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-

person, one-vote principles,' we would surely conclude the Constitution had been violated."). "Allegations of unconstitutional bias in apportionment are most serious claims, for we have long believed that 'the right to vote' is one of 'those political processes ordinarily to be relied upon to protect minorities.'" *Id.* at 311-12 (Kennedy, J., concurring in the judgment) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4 (1938)).

This Court has not agreed, however, on a set of judicially manageable standards to identify and remedy violations. This concern should not prevent the Court from prohibiting partisan gerrymandering. Legislatures found to have engaged in unconstitutional partisan gerrymandering could draw from many options to remedy any constitutional violations and prevent future ones. These systems both provide protection to States on the front end by removing partisan consideration and allow States the ability to quickly devise remedies in the event a court finds a violation.

As the Court has recognized, some States already have begun to delegate the task of districting to independent redistricting commissions. *Arizona State Legislature v. Arizona Indep. Redistricting Com'n*, 135 S. Ct. 2652, 2662 (2015). As Appellees note, this approach generally will defeat partisan gerrymandering claims because a plaintiff could not meet the intent element. Appellees Br. At 55.

Another approach involves the adoption of any of several voting methods that inherently undermine political gerrymandering, such as ranked choice voting, cumulative voting, and the single vote form of

limited voting. Using these voting methods in combination with multi-member districts can reduce or eliminate partisan gerrymandering entirely.

The Constitution does not mandate winner-take-all elections or single member districts. *How* a State chooses to district should not dictate *whether* it may engage in unconstitutional partisan gerrymandering. A State may choose to use other methods of districting that would mitigate or eliminate the use of discriminatory partisan tactics in districting.

ARGUMENT

I. Singling Out Voters On The Basis Of Partisan Affiliation Is Unconstitutional.

When lawmakers discriminate against groups in the political process, they strike at the heart of our democracy and the "consent of the governed." This Court has long recognized that our legal structure requires some measure of representational equality that effectuates the core "consent of the governed" principle:

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be

> bodies which are collectively responsive to the popular will.

Reynolds v. Sims, 377 U.S. 533, 565 (1964).

This Court has not hesitated to intervene when a legislature "singles out a readily isolated segment of a racial minority for special discriminatory treatment." *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (holding that a racially gerrymandered legislative district could violate the Fifteenth Amendment). Unequal treatment of citizens under the law lifts controversies "out of the so-called 'political' arena and into the conventional sphere of constitutional litigation." *Id.* at 347. In *Gomillion*, the Alabama legislature manipulated the boundaries of Tuskeegee into a bizarre twenty-eight-sided figure, removing hundreds of black voters without removing a single white voter. *Id.* at 341. In that case, "the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation [was] solely concerned with . . . fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.*

In *Shaw v. Reno*, 506 U.S. 630, 652 (1993), this Court reaffirmed that States may not redistrict in contravention of the Fourteenth Amendment's prohibition on racial discrimination: "[T]he essence of the equal protection claim recognized in *Shaw* is that the State has used race as a basis for separating voters into districts." *Miller v. Johnson*, 515 U.S. 900, 911 (1995). It is equally true that the Constitution prohibits discrimination on the basis of partisan affiliation or voting history. Just as this Court struck down the "max black" plan passed by Georgia in *Miller*, so too should it strike down the

Final Map passed by Wisconsin here that, in the words of the District Court, "was intended to burden the representational rights of Democratic voters throughout the decennial period by impeding their ability to translate their votes into legislative seats." *Whitford v. Gill*, 218 F. Supp. 3d 837, 843 (W.D. Wis. 2016); *see also* Appellee Br. at 6 (noting map names like "Joe Aggressive").

And while it is true that this Court has permitted States to consider political factors in drawing district lines, it should not countenance a State acting intentionally to favor one party over another. In *Gaffney v. Cummings*, 415 U.S. 735 (1973), the Court permitted a plan that favored incumbents of *both parties* by taking account of political considerations. The situation here—where a State intentionally discriminates against the voters of one party—is far different from the political consideration allowed in *Gaffney*.

Not only does the Fourteenth Amendment prohibit unequal treatment of similarly situated persons or groups, the First Amendment prevents a State from punishing voters on the basis of their political beliefs. The First Amendment protects, among other things, erotic dancing, neo-Nazi marches, violent video games, and games, and price advertisements for alcoholic beverages. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 804 (2011) (striking down California's prohibition on the sale of violent video games); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (protecting erotic nude dancing); 44 *Liquormart Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (striking down Rhode Island's prohibition of advertisement of alcoholic beverage pricing); *Nat'l*

Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 44 (1977) (reversing a prohibition of a neo-Nazi march in Skokie).

A First Amendment that not only protects such speech but also remedies any violation of these rights surely protects a political party from districting policies that intentionally discriminate against individuals on the basis of partisan affiliation. Indeed, if the core of the First Amendment is protecting political speech, the core of political speech comes in the act of voting. *See, e.g., Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 405 (2011) (affirming that "speech on matters of public concern that lies 'within the core of First Amendment protection'"); *Williams v. Rhodes*, 393 U.S. 23, 41 (1968) ("The right to have one's voice heard and one's views considered by the appropriate governmental authority is at the core of the right of political association.").

"There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments . . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). "The illuminating source to which we turn in performing the task is the system of government the First Amendment was intended to protect, a democratic system whose proper functioning is indispensably dependent on the unfettered judgment of each citizen on matters of political concern." *Elrod v. Burns*, 427 U.S. 347, 372 (1976).

A "First Amendment test" for partisan gerrymandering "focuses *on the motive* for manipulating district lines, *and the effect* the manipulation has on voters, *not on the result* of the vote." *Benisek*, slip op. at 28 (Niemeyer, J., dissenting). "The harm is not found in any particular election statistic, nor even in the outcome of an election, but instead on the intentional and targeted burdening of the effective exercise of a First Amendment representational right." *Id.* As Justice Kennedy stated in *Vieth*, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." 541 U.S. at 314. Thus, "[i]n the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Id.*

The standard adopted by the lower court here further effectuates this Court's *Reynolds*- and *Shaw*-based jurisprudence and the principle articulated by Judge Niemeyer in *Benisek*. Courts can deploy well-tried techniques in their judicial toolkit to prevent legislatures from redistricting with constitutionally forbidden legislative intent. In many areas of state action, courts detect equal protection violations when a legislature acts with a "[d]iscriminatory purpose," meaning that the its decision was made "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney*, 422 U.S. 256, 279 (1979); *see also Miller*, 515 U.S. at 916 (quoting *Feeney*).

In *Vieth*, a majority of Justices chose not to deem partisan gerrymandering claims outside the realm of judicial scrutiny. *See* 541 U.S. at 308 (Kennedy, J., concurring in judgment). All Justices in *Vieth* accepted that the "excessive injection of politics [into the redistricting process] is unlawful." *Id.* at 293 (plurality); *id.* at 317 (Kennedy, J., concurring in judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated."); *id.* at 337-38 (Stevens, J., dissenting) ("The rational basis for government decisions must satisfy a standard of legitimacy and neutrality; an acceptable rational basis can be neither purely personal nor purely partisan."); *id.* at 354 (Souter, J., dissenting) ("It is sufficient instead to agree that gerrymandering is, indeed, unfair . . . and to adopt a test aimed at detecting and preventing the use of those methods."); *id.* at 355 (Breyer, J., dissenting) ("The use of purely political considerations in drawing district boundaries is not a 'necessary evil' that, for lack of judicially manageable standards, the Constitution inevitably must tolerate."). As discussed below, States and courts can draw on established principles to prevent any Constitutional violation in the first instance and to remedy any violation a court may find.

II. States Will Retain Ample Flexibility In A Districting Process That Excludes Political Gerrymandering.

If the Court deems partisan gerrymandering a justiciable controversy, the States will retain control over the redistricting process. States have a wide range of options to prevent future intentional partisan gerrymandering and to remedy any constitutional violations due to this practice. The Court and Appellees have addressed one, the adoption of a bipartisan or nonpartisan redistricting process. *Arizona State Legislature*, 135 S. Ct. at 2662; Appellee Br. at 54-55. Reconfiguration of the districting process, however, is not the only approach. The Constitution does not mandate the current format of single member districts in winner-take-all format. *See, e.g., Branch v. Smith*, 538 U.S. 254 (2003) (discussing at-large and single-member districts); *id.* at 302-08 (O'Connor, J., concurring in part and dissenting in part) (recounting history); *Holder v. Hall*, 512 U.S. 874, 897 (Thomas, J., concurring in judgment) ("[T]here is no principle inherent in our constitutional system, or even in the history of the Nation's electoral practices, that makes single member districts the 'proper' mechanism for electing representatives to governmental bodies.").

A variety of electoral structures that go beyond the narrow confines of winner-take-all, single winner districts also can reduce or eliminate the harms of partisan gerrymandering.

A. Several Commonly Used Voting Methods Can Make Partisan Gerrymandering Infeasible.

States can prevent partisan gerrymandering by adopting an electoral system that reduces the ability of interested parties to "crack" or "pack" voters. *See Vieth*, 541 U.S. at 286 n.7 (plurality opinion) (describing those terms as tools that enable gerrymandering by "packing" a particular group of voters in one district—thereby reducing their influence in surrounding districts—or "cracking" them into numerous districts—thereby reducing their opportunity to elect candidates of their choice in those districts). Many of these systems and voting methods are widely used in United States elections.

1. Ranked Choice Voting Is One Option States Can Consider.

Ranked choice voting, which is also known as single transferrable voting, is an electoral system in which voters rank candidates in order of preference. Alexander Athan Yanos, *Reconciling the Right to Vote with the Voting Rights Act*, 92 Colum. L. Rev. 1810, 1859-60 (1992). Under this framework, a ballot is initially counted for the voter's first choice candidate. *Id.* If the voter's first choice candidate, however, does not secure the sufficient threshold of votes needed to win, the ballot will then be counted for the voter's second choice candidate, and so on if necessary. *Id.*

Ranked choice voting reduces the feasibility of partisan gerrymandering because "[b]y first choice or transfer, almost all voters will have had an opportunity to elect a candidate." *Id.* at 1861. A

ranked choice voting system "allows a minority group to concentrate its voting power without requiring districting, and it has the additional advantage of ensuring that 'surplus' votes are transferred to support the election of the minority voters' next preference." 512 U.S. at 910 n.16 (Thomas, J., concurring in judgment).

Since the start of the twentieth century, dozens of American municipalities have utilized ranked choice voting. Andrew Spencer, Christopher Hughes, & Rob Richie, *Escaping the Thicket: The Ranked Choice Voting Solution to America's Redistricting Crisis*, 46 CUMB. L. REV. 377, 410 (2016).[2] In cities like Cincinnati and New York, the adoption of ranked choice voting has secured representation for previously excluded political and racial minorities. In the 1920s, Cincinnati adopted ranked choice voting and beginning in 1931, it consistently elected African Americans to its city council. *Id.* at 410. In the 1930s, New York City implemented ranked choice voting and successfully reduced the share of city council seats controlled by the Tammany Hall political machine as other parties began to win seats in numbers proportional to their share of the vote.

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[2] The cities that adopted and used ranked choice voting at some point since the beginning of the twentieth century are Ashtabula, OH; Boulder, CO; Kalamazoo, MI; Sacramento, CA; West Hartford, CT; Cleveland, OH; Cincinnati, OH; Hamilton, OH; Toledo, OH; Wheeling, WV; New York, NY; Norris, TN; Yonkers, NY; Cambridge, MA; Lowell, MA; Long Beach, NY; Coos Bay, OR; Saugus, MA; Worcester, MA; Medford, MA; Quincy, MA; Revere, MA; Hopkins, MN; and Oak Ridge, TN. *History of RCV*, RANKED CHOICE VOTING RESOURCE CENTER, http://www.rankedchoicevoting.org/history_rcv (last viewed Sep. 4, 2017).

Belle Zeller & Hugh A. Bone, *American Government and Politics: The Repeal of P.R. in New York City--Ten Years in Retrospect*, 42 AM. POL. SCI. REV. 1127, 1132 (1948). Prior to implementation, Tammany Hall had long dominated city politics by manipulating the electoral process to engineer supermajorities on the city council. *Id.* at 1127-28 ("On the old board of alderman elected through single-member districts, the Democrats had a virtual one-party monopoly of representation.").

Ranked choice voting has also proven effective in numerous foreign countries. For almost a century, Australia has used ranked choice voting in both state and federal elections. Colin A. Hughes, *STV in Australia, in* ELECTIONS IN AUSTRALIA, IRELAND, AND MALTA UNDER THE SINGLE TRANSFERABLE VOTE: REFLECTIONS ON AN EMBEDDED INSTITUTION, 155 (Shaun Bowler & Bernard Grofman ed. 2000). Ireland and Malta have also used ranked choice voting in federal elections to elect at least one national legislative chamber. Michael Gallagher, *The (Relatively) Victorious Incumbent under PR-STV: Legislative Turnover in Ireland and Malta, in* ELECTIONS IN AUSTRALIA, IRELAND, AND MALTA UNDER THE SINGLE TRANSFERABLE VOTE: REFLECTIONS ON AN EMBEDDED INSTITUTION, 87-88 (Shaun Bowler & Bernard Grofman ed. 2000). In addition, New Zealand, Northern Ireland, and Scotland continue to utilize ranked choice voting at the municipal level. Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting will end Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. RICH. L. REV. 959, 982 (2013).

2. Cumulative Voting Provides Another Option For States.

Cumulative voting is another electoral system that can reduce the risk of partisan gerrymandering. Under cumulative voting, voters may cast as many votes as there are open seats, which they can distribute among the candidates. *Holder*, 512 U.S. at 910 n.15 (Thomas, J., concurring in judgment). Voters can give all their votes to one candidate or distribute them among several. *Id.*

Similar to ranked choice voting, cumulative voting reduces the feasibility of partisan gerrymandering because it "allows a numerical minority to concentrate its voting power behind a given candidate without requiring that the minority voters themselves be concentrated into a single district." *Id.*

"[A] court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the Voting Rights Act." *Branch*, 538 U.S. at 310 (O'Connor, J., concurring in part and dissenting in part) (citing, among other authorities, *Growe v. Emison*, 507 U. S. 25, 40 (1993); *Rogers v. Lodge*, 458 U. S. 613, 616-617 (1982); and *Holder*, 512 U.S. at 897-898, 908-912 (Thomas, J., concurring in judgment)).

In fact, cumulative voting is used in dozens of municipalities. Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 ST. LOUIS U. PUB. L. REV. 97, 98 (2010). In Chilton County, Alabama, for example, voters have elected the County Commission and the Board

of Education by cumulative voting since 1988. Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 242 (1995). The introduction of cumulative voting was immediately responsible for a significant increase in political and racial minority representation in Chilton County's elected bodies. *Id.* at 272, such as African Americans, women, and Republicans. *Id*; *see also infra* Part III.b. Cumulative voting also features prominently in corporate board elections. Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 399 (1983).

For over a century, the Illinois House of Representatives utilized cumulative voting to elect its State house of representatives. ILLINOIS ASSEMBLY ON POLITICAL REPRESENTATION & ALTERNATIVE ELECTORAL SYSTEMS, EXECUTIVE SUMMARY 15-16 (2001), http://archive.fairvote.org/op-edsexecsum.pdf (hereinafter EXECUTIVE SUMMARY). The system was adopted with the goals of decreasing polarization between the northern and southern parts of the state, reducing the power of party caucuses and leaders, and replacing the "feudal theory of exclusive majority representation with the true ideas of representative government." *Id.* at 15.

Although Illinois ultimately abandoned cumulative voting in tandem with reducing the size of the legislature, recent legislative assessements have confirmed that cumulative voting suceeded at achieving its intended purpose. In 2001, the Illinois Assembly on Political Representation and Alternative Electoral Systems, a task force co-chaired by former White House counsel Abner Mikva

and former Governor Illinois Jim Edgar, conducted "an objective and comprehensive evaluation of Illinois' electoral system." EXECUTIVE SUMMARY at 8. The assembly's evaluation concluded that although the cumulative voting system had faults, it was nevertheless more effective at deterring partisan gerrymandering than plurality voting: [I]t appears that it was more difficult under cumulative voting than under plurality voting to achieve partisan advantage in terms of the seats-to-votes ratio. *Id.* at 21.

3. The Single Vote Form Of Limited Voting Provides Another Established Option.

Another system with the same threshold of exclusion is the single vote form of limited voting, where voters cast one vote in a multi-winner district; variations of this system are used across the United States today. Steven J. Mulroy, *Coloring Outside the Lines: Erasing: "One-Person, One-Vote" & Voting Rights Act Line-Drawing Dilemmas by Erasing District Lines*, 85 Miss. L. J., 1271, 1292-93 (2017).

Because of its simplicity, the single vote system can provide for a quick way to resolve districting issues. For example, when the town of Calera, Alabama illegally redistricted in 2008, eliminating its sole majority-minority district, the court ordered the city to elect citywide with the single vote system, avoiding any need to redraw districts. *United States of America v. City of Calera, Alabama, et. Al.*, No. CV-08-BE-1 982-S (M.D. Ala. Oct. 23, 2009), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/calera_cd_mod.pdf.

B. When Combined With One Of These Voting Methods, Multi-Winner Districts Can Eliminate Partisan Gerrymandering.

When used with one of the above voting methods, a multi-winner district elects candidates that cross a certain threshold percentage of votes. Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems As Voting Rights Act Remedies*, 77 N.C.L. Rev. 1867, 1880 (1999) (hereinafter Mulroy, *Alternative Ways Out*). The number of open seats in the district determines the threshold percentage.[3] In a multi-winner district with three open seats, for example, all candidates that receive over 25% of the vote are elected. In a four-winner district, candidates who receive over 20% are elected; in a five-winner district the threshold is 16.7%; and so on.

The use of multi-winner districts with one of these voting methods makes partisan gerrymandering more difficult and less effective in at least two ways. *First*, more winners in an election lowers the amount needed for any one candidate to emerge victorious and thus reduces the incentive for a dominant political group to "crack" or "pack" districts. *See Vieth*, 541 U.S. at 286 n.7 (plurality opinion). *Second*, multi-winner districts are larger and more heterogeneous than single-winner districts. *See* Steven J. Mulroy, *Alternative Ways Out* at 1871.

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[3] The formula to determine the threshold is one divided by the number of open seats plus one. For a district that elects three representatives, the formula is 1/(3+1). Mulroy, *Alternative Ways Out*, *supra*, at 1880.

The use of multi-winner districts with one of these voting methods diminishes the importance of district lines and affords a minority of voters the opportunity to elect candidates of their choice. Excessive partisan gerrymandering would be extraordinarily difficult, if not impossible.

One model that States and courts could adopt is a system that combines multi-winner districts with ranked choice voting. The Fair Representation Act, recently introduced in Congress by Representative Don Beyer of Virginia, sets forth a plan to move United States House of Representative elections into multi-winner districts drawn by independent redistricting commissions, and elected through ranked choice voting. H.R. 3057, 115th Cong. (2017). 24 states would not draw any districts, and most of the rest would only need to create two or three districts. *Id.*

Since its introduction, the Fair Representation Act has garnered bipartisan support. For example, Reihan Salam, Executive Editor of the *National Review* co-authored an op-ed in support of the Fair Representation Act in *The New York Times* with Rob Richie, Executive Director of FairVote. Reihan Salam & Rob Richie, *How to Make Congress Bipartisan*, N.Y. TIMES, July 8, 2017 at A19.

C. The Adoption Of These Electoral Systems Can Either Prevent Or Remedy Partisan Gerrymandering Litigation.

Non-winner-take-all systems provide courts with potential remedies in partisan gerrymandering suits. Because it becomes quite simple to create plans that create more voter choice, these voting methods are

particularly attractive for jurisdictions that want to avoid lawsuits and for courts seeking a remedy under a short timeline. Because they make representation less tied to district lines, they also free courts from needing to weigh the trade-offs inherent in judging district maps. Several possibilities exist for how States could apply these methods.

First, a jurisdiction could voluntarily adopt one of these voting methods to avoid the threat of litigation altogether. As discussed in Part II, *supra*, such voting methods make gerrymandering impracticable by reducing the potential for dilution of minority voters. Jurisdictions seeking to avoid the threat of a lawsuit over their district lines could adopt one of these methods to replace winner-take-all districts.

Second, jurisdictions could adopt one of these voting methods as part of settlement agreements or courts could do so as temporary remedies. This is frequently done in suits under the Voting Rights Act, where a defendant agrees to adopt another voting system—often cumulative or limited voting—designed to bolster representation of a minority group that had been marginalized under the previous voting system. *See, e.g.*, *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870 (M.D. Ala. 1988) (approving a settlement agreement to implement cumulative voting for a county commission and board of education in a Voting Rights Act suit); *Dillard v. Town of Cuba*, 708 F. Supp. 1244 (M.D. Ala. 1988) (approving a settlement agreement to implement limited voting for city councils in a Voting Rights Act suit).

Should this Court recognize that partisan gerrymanders present a justiciable constitutional claim, States will have the choice to use tested and effective systems. Independent commissions take partisanship out of gerrymandering, while voting systems distinct from winner-take-all elections in single member districts provide built-in resistance to gerrymanders.

Given the magnitude of the harm that occurs due to partisan gerrymandering, this Court should allow constitutional violations to proceed to the remedy stage. A rule against partisan gerrymandering would encourage States to consider solutions at the beginning of the process—thereby leading to less litigation in the long term. In short, States have a variety of solutions that would prevent partisan gerrymandering.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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